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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 41

LESLIE IRVIN, PETITIONER

vs.

A. F. DOWD, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 18, 1960

CERTIORARI GRANTED FEBRUARY 22, 1960

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1 IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12980

SEPTEMBER TERM, 1957, JANUARY SESSION, 1958

LESLIE IRVIN, PETITIONER-APPELLANT

v.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

Opinion—January 29, 1958

Before DUFFY, *Chief Judge*, and FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. From an order of the district court dismissing his petition for a writ of habeas corpus, petitioner has appealed to this court.[1]

The controlling facts are set forth in the opinion of the district court, 153 F. Supp. 531, and in the opinion of the Indiana Supreme Court in *Irvin* v. *State*, 236 Ind. 384, 139 N.E. 2d 898.

Defendant was tried in the Circuit Court of Gibson County, Indiana, on an indictment charging him with murder. On December 20, 1955 a verdict finding him guilty of murder was returned by the jury and, on January 9, 1956, a judgment was entered on the verdict and he was sentenced to

2 death. On January 18, 1956 defendant escaped from the county jail and his whereabouts was not known on January 19, 1956, at which time the trial court was informed by the sheriff of these circumstances. At the same time the de-

[1] Petitioner is also referred to herein as "defendant."

fendant's attorneys filed a motion for a new trial, charging 415 errors committed by the trial court, including several attacking the impartiality of the jurors. The trial court's order of January 23, 1956 recites that defendant's attorneys filed with the court a copy of a letter received from defendant reading, in part, as follows:

"Wednesday
January 18, 1956

"Dear Ted:

I know this is the wrong thing to do, but I can't just go up to Michigan City and wait. If, they ever give me a new trial, I'll come back and face it. Maybe the jury then will believe the truth. * * *"

By said order the court overruled the motion for a new trial. Defendant then appealed to the Supreme Court of Indiana, which affirmed the judgment below. *Irvin* v. *State, supra.*[2]

In this case there is no disagreement with the well-established principle that a person convicted of a criminal offense in a state court has no right to prosecute a petition for a writ of habeas corpus in a federal court, based upon an alleged violation of his federal constitutional rights, unless he has exhausted his available state remedies. *Brown* v. *Allen*, 344 U.S. 443, 487. This principle has found repeated recognition, including our decision in *United States* v. *Ragen*, 224 F. 2d 611, 614.

It must be borne in mind that, unless and until defendant shows that he has exhausted remedies afforded him by the state of Indiana, we are not permitted to consider whether his federal constitutional rights were violated at his trial.

However the parties hereto are not agreed on whether defendant did exhaust Indiana's remedy of appeal to the Supreme Court of Indiana, of which he chose to avail
3 himself. The only assignment of error by defendant in the Supreme Court of Indiana was that the trial court erred in overruling his motion for a new trial.

The state supreme court thoroughly considered the law as announced in numerous court decisions, and held, at 901,

[2] The Supreme Court of the United States denied certiorari to the Supreme Court of Indiana "without prejudice to filing for federal habeas corpus after exhausting state remedies." 353 U.S. 948.

"• • • If a prisoner escapes he is not entitled during the period he is a fugitive to any standing in court or to file any plea or ask any consideration from such court."

That court pointed out:

"• • • There is no showing that the appellant voluntarily surrendered himself. Instead, counsel in argument admitted that he remained a fugitive from justice until he was recaptured in the state of California. This occurred some considerable time after the period within which the motion for a new trial could have been filed. The time ran out on appellant while he was voluntarily a fugitive from justice.

"The action upon which the appellant predicates error in this appeal is based *solely upon the overruling of a motion for a new trial.* There is no other error claimed. Since appellant had no standing in court at the time he filed a motion for a new trial the situation is the same as if no motion for a new trial had been filed, or he had voluntarily permitted the time to expire for such filing. His letter reveals he was aware of this right, and had talked with his attorneys about a new trial and an appeal.

"No error could have been committed in overruling the motion for a new trial under the circumstances." (Italics supplied for emphasis.)

We must accept as an authoritative statement of the law of Indiana what its supreme court said in the foregoing language. Therefore, briefly stated, the state law applicable to the facts in the record, is: Only by his motion for a new trial presented and argued to the court, while the court had custody of the defendant, could he have taken the first step in his resort to the remedy of appeal afforded him by the law of Indiana.

We think it is plain from a reading of defendant's letter, written after his escape, that he did not intend to again
4 submit himself to the custody of the trial court if that court did not, in advance of such submission by him, grant him a new trial. It follows that if the court, after

laborious consideration of the multitudinous grounds asserted by defendant, had denied his motion for a new trial, he would not have voluntarily returned and, if not recaptured, the trial court would have been powerless to enforce its judgment against him. Defendant did not exhaust the remedy afforded him by the law of Indiana. Instead he sought to substitute a remedy of his own creation, which in its operation would have permitted him, from a secret hiding place, by remote control, to coerce the trial court to do his bidding. Thereby he sought to transform the court of a sovereign state into a mere puppet. Indiana had furnished him a remedy, simple and complete, originating in a motion for a new trial and leading by appeal to the highest court in the state. The trial court was in session in its accustomed place to hear such a motion; defendant was not there. There was nothing for the court to do but deny the motion, which it did.

As we have seen, on an appeal to the Supreme Court of Indiana, the action of the trial court was affirmed. We are in accord with the district court, because, in such a situation, a defendant in a criminal case is not entitled to relief in a federal court based upon the alleged violation of his rights derived from the constitution of the United States.

In *Allen* v. *Georgia*, 166 U.S. 138, Allen procured a writ of error from the United States Supreme Court, to review an order of the Supreme Court of Georgia, dismissing a writ of error from that court to a Superior Court in that state. The latter writ sought to reverse the conviction of Allen for murder. In the federal court Allen relied upon the due process of law provisions of the federal constitution. The facts showed that, after Allen had been convicted and sentenced to death by the Superior Court, he made a motion for a new trial, which was overruled. When his case in the state supreme court was called, it was made to appear by affidavits that, after his conviction and sentence, Allen escaped from jail and was at that time a fugitive from justice. Thereupon the court ordered the writ of error dismissed, unless he surrendered within 60 days or should be recaptured within that time, so as to be subject to the jurisdiction of the court. After the 60 days expired, it appearing that he had not surrendered him-

5 self or been rearrested, the Georgia Supreme Court dismissed the writ of error and its judgment was thereafter made the judgment of the Superior Court. Afterwards Allen, having been recaptured, was resentenced to death by the Superior Court, whereupon the writ of error issued from the United States Supreme court, which pointed out, at 140:

> "* * * In a similar case from the Supreme Court of Nebraska, *Bonahan* v. *Nebraska*, 125 U.S. 692, wherein it appeared that, pending the writ of error from this court, the plaintiff in error had escaped, and was no longer within the control of the court below, it was ordered that the submission of the cause be set aside, and unless the plaintiff were brought within the jurisdiction of the court below on or before the last day of the term, the cause should be thereafter left off the docket until directions to the contrary. A like order under similar circumstances was made in *Smith* v. *United States*, 94 U.S. 97."

The court also said, at 141:

> "'We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody * * * he is put in a position of saying to the court: 'Sustain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial and I will leave the State, or forever remain in hiding.' We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit. It is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.'"

The court in the *Allen* case cited *Commonwealth* v. *Andrews*, 97 Mass. 543, saying that it was there held that where the defendant escaped during the pendency of his case in the state

supreme court, he could not be heard by attorney, the defendant not being present in person; and that if a new trial were ordered, he was not there to answer further, and that if the exceptions were overruled, a sentence could not be pro-
6 nounced or executed upon him. The United States Supreme Court quoted with approval the following language from the *Andrews* case, at 544:

> "So far as the defendant had any right to be heard under the constitution, he must be deemed to have waived it by escaping from custody and failing to appear and prosecute his exceptions in person, according to the order of court under which he was committed."

The court also cited with approval *Sargent* v. *The State*, 96 Ind. 63. In that case Sargent was convicted of a felony under Indiana law and took an appeal to the state supreme court. However before his appeal was filed in that court, he escaped from custody. When this matter was made known to the supreme court the appeal was dismissed. The Indiana court pointed out that Sargent was not in the custody or under the control of the trial court or its officers at the time the bill of exceptions appearing in the record was signed and filed. At 65, the court said:

> "• • • It must be taken as true, therefore, that the defendant, Sargent, before and at the time this appeal was attempted to be taken, was and still is at large as an escaped convict, and that such attempted appeal, though nominally taken by him and in his name, was in fact taken by the attorney who appeared for and represented him during the progress of the cause in the court below."

The Indiana Supreme Court said, at 66:

> "• • • It may well be doubted, we think, whether this appeal was legally taken in the name of the defendant, Sargent, when it appears, as it does, that all the steps required by the statute, in taking an appeal in a criminal action, were taken in this case after his escape from the custody of the law. Section 1887, R.S. 1881. But, waiving this point, we are convinced that it is no part

of our duty, as an appellate court, to entertain the appeal of the defendant, Sargent, in this case, and review the decision and orders or rulings of which he complains, while he is at large as an escaped convict. * * *"[3]

7 The Indiana court also said:

"It is the constitutional right of the accused, in all criminal prosecutions 'to be heard by himself and counsel;' but it must be held, we think, that he has no right to appear by counsel alone, after he has escaped from lawful custody and is at large. Such has been the uniform holding of the courts of last resort in other jurisdictions, and it meets our full approval. * * *"

The appeal was dismissed.

Smith v. *United States*, 94 U.S. 97 was also cited in the *Allen* case. In the *Smith* case, the court said:

"* * * In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."

In the case at bar the trial court was not required to consider defendant's motion for a new trial while he was a fugitive. It was not required to hear and decide what, from then existing facts, might prove to be only a moot case.

An escape of a prisoner from custody has the same effect upon proceedings in his case in the trial court as it does in a reviewing court upon appeal from a conviction. The Indiana Supreme Court in defendant's appeal recognized that fact when, in relying upon *Allen* v. *Georgia*, *supra*, and other cases, it said of defendant, at 900:

[3] The court then quoted with approval a part of the language of Chief Justice Waite in *Smith* v. *United States*, 94 U.S. 97, set forth by us, *post* 7.

"* * * He was asking the court through ostensible counsel to do a futile or useless act, depending upon *his whim or decision* as to whether or not he would finally
or voluntarily surrender himself for a new trial. There
8 was only one ruling the trial court could make in this case under the circumstances which were created by the appellant's own act of escape, and that was to deny or overrule the motion for a new trial.

* * * * *

Courts do not grant new trials on the basis of bargaining with a defendant at large. It is an affront to the court, and contemptuous to express such assumption. If the court had granted his request for a new trial, and he had thereupon voluntarily surrendered, the appearances of a bargain would have been substantiated. *Smith* v. *United States*, 1876, 94 U.S. 97, 24 L. Ed. 32."

This ruling did not violate any of defendant's rights under the due process clause of the federal constitution.

Defendant did not exhaust his remedies under the law of Indiana. By his escape he abandoned the remedy to which his attorneys resorted. In *Brown* v. *Allen, supra*, at 487, the court pointed out that "To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ."

For the reasons hereinbefore set forth the judgment of the district court is affirmed and the stay of execution heretofore entered herein is vacated.

AFFIRMED AND STAY OF EXECUTION VACATED.

FINNEGAN, *Circuit Judge*, Concurring. In my study of this case one point lost but lurking throughout the extensive record encompassing the Gibson Circuit Court proceedings, implemented by evidence taken in the United States District Court emerges into sharp focus. Counsel for Irvin grounded their petition for a writ of habeas corpus, filed in the United States District Court on allegedly constitutional deprivations arising before Irvin's escape from jail. The adverse ruling on the

motion for a new trial, by the Indiana judge, and Indiana Supreme Court's decision on that point are unchallenged. Irving does not expressly say that overruling his motion for a new trial violated his rights under the Fourteenth Amendment. He had access to the Indiana Supreme Court on
9 appeal from his conviction. Indeed the brief filed for him in our court informs us "* * * he was permitted to appeal without objection, counsel were appointed for * * * [him] for the purpose of appealing his conviction in the Gibson Circuit Court to the Indiana Supreme Court * * *"

We are reviewing a District Judge's findings of fact and conclusions of law underpinning a judgment approving the Indiana detention as being legal and denying a petition to stay execution. *Irvin* v. *Dowd*, 153 F. Supp. 531 (D.C. Ind. 1957). Rule 52, Federal Rules of Civil Procedure circumscribes our review of findings of fact in appeals where habeas corpus has been refused below. *Hunter* v. *Dowd*, 198 F. 2d 13 (7th Cir. 1952). Judge Parkinson, then presiding as District Judge, held a hearing on Irvin's petition and received some testimony. Measured by Rule 52, his relevant findings of fact can be left undisturbed.

Requiring as it does exhaustion of remedies available in state courts, the statute (28 U.S.C. § 2254) precluded relief in the district court. Nothing in the record before us suggests any official interference or incapacity justifying Irvin's failure to use the Indiana remedy by appeal. *Brown* v. *Allen*, 344 U. S. 443, 485–486 (1952). Again I point out we are not called upon, nor can we now review, the Indiana Supreme Court's holding that no error was committed "in overruling the motion for a new trial under the circumstances." 139 N.E. 2d 898, 902. Since the point is not raised on Irvin's behalf, he abandoned his motion for a new trial by departing from the Gibson Circuit Court's jursdiction. Only an attack on the Indiana holding that its corrective judicial process was forfeited would put in issue such proposition.

By his flight after verdict, Irvin forfeited a timely appeal to the Indiana Supreme Court for the purposes of obtaining review of the adverse ruling on his motion for a new trial. But he was no longer at large when the State Supreme Court

handed down its opinion reported as *Irvin* v. *Indiana*, 139 N.E. 2d 898 (1957). That fact distinguishes the situation facing our court from *Eisler* v. *United States*, 338 U.S. 189 (1949) in so far as there could possibly be any question about reviewing a conviction while a defendant-appellant is a fugitive from the state reviewing tribunal's jurisdiction.

Though the Indiana Supreme Court viewed Irvin's case as if no motion for a new trial had been filed, and consequently found that the denial of it was procedurally sound, that tribunal pressed further, saying, inter alia: "* * * however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that *there is no miscarriage of justice in this case.*" *Irvin* v. *Indiana*, 139 N.E. 2d 898, 902 (1957). (Italics added.) After relating and discussing various evidentiary elements disclosed by the record the Indiana court concluded (*Id.* at 902): "It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment, or due course of law under the Bill of Rights, Const. art. 1, § 12 or that there was any miscarriage of justice when he (Irvin) was convicted and given the death penalty." (*Id.* at 902.) Certainly those quoted passages manifest a cautionary mood and judicial reluctance to rely solely on a technicality, regardless of its validity. Of course I think whatever was said by the Indiana Court after passing their decision point on the motion, was *dicta*. Supporting that motion were some 415 alleged reasons and grounds, among which a fair proportion concerned aspects of the jury problem and they, I assume, were unreviewed for the reasons already stated.

DUFFY, *Chief Judge*, concurring.

Irvin was not accorded due process of law in the trial which resulted in his conviction and death sentence. In my judgment, he did not receive a fair trial because some of the jury had pre-conceived opinions as to defendant's guilt, and also because of the conduct of the prosecuting attorney. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison et al.*, 349 U.S. 133, 136.

More than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some testified on the *voir dire* that it would take evidence to change that opinion. Defendant exhausted his twenty peremptory challenges. His motion for a continuance had been denied.

11 I realize that a prolonged effort was made to obtain an impartial jury. 451 prospective jurors were questioned. 269 were successfully challenged for cause. Nevertheless, the jury, as finally constituted, in my opinion, was not impartial. Probably it was as impartial as could be found in Gibson County on that date, but that was not sufficient to insure due process.

Another reason for the failure of due process was that the prosecuting attorney also acted as a witness on the trial. Mr. Wever participated in examining prospective jurors, interposed objections to testimony, and otherwise participated in the trial. He then took the stand as a witness and testified concerning a confession made to him. Over objection, he made the closing argument to the jury and commented on the evidence including his own testimony. Such conduct was in violation of Canon 19 of the Canons of Professional Ethics. Such conduct was offensive to the rights of a defendant to a fair and impartial trial.

In spite of my belief that there was failure to accord defendant due process in his trial, I am convinced for the reasons stated in Judge Schnackenberg's opinion, that defendant is in no position to maintain a writ of habeas corpus in a federal court. By his escape from custody after he had been convicted and sentenced, he elected to embark upon a course of conduct which, under Indiana law, was a waiver of his right to appeal to the Indiana Supreme Court. In deference to the authorities cited in Judge Schnackenberg's opinion, I must agree defendant did not exhaust his available state remedies, and the District Court correctly dismissed the petition for a writ of habeas corpus.

12 IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12080

LESLIE IRVIN, PETITIONER-APPELLANT

vs.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

Judgment—January 29, 1958

Before Hon. F. RYAN DUFFY, *Chief Judge;* Hon. PHILIP J. FINNEGAN, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, *Affirmed.*

It is further ordered that, when this Court's mandate in this cause is hereafter issued herein, the stay of execution heretofore entered in this Court be vacated.

13 IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

(Title omitted)

Order denying petition for rehearing—February 19, 1958

Before Hon. F. RYAN DUFFEY, *Chief Judge;* Hon. PHILIP J. FINNEGAN, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

It is ordered by the Court that the appellant's petition for a rehearing of this cause be, and the same is hereby, *Denied.*

SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1958.

Leslie Irvin, Petitioner, v. Alfred F. Dowd, Warden of the Indiana State Prison.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 4, 1959.]

Mr. Justice Brennan delivered the opinion of the Court.

Petitioner brought this habeas corpus proceeding in the District Court for the Northern District of Indiana under 28 U. S. C. § 2241,[1] claiming that his conviction for murder in the Circuit Court of Gibson County, Indiana was obtained in violation of the Fourteenth Amendment. The District Court dismissed the writ, 153 F. Supp. 531, under the provision of 28 U. S. C. § 2254 that habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state . . . ."[2] The Court of Appeals for

[1] Section 2241 provides in pertinent part:

"(a) Writs of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions.

"(c) The writ of habeas corpus shall not be extended to a prisoner unless . . . .

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

[2] The full text of § 2254 is as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of

the Seventh Circuit affirmed. 251 F. 2d 548. We granted certiorari, 356 U. S. 948.[2]

The constitutional claim arises in this way. Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, stating that the petitoner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner,

circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[2] The case was here previously on Irvin's petition seeking direct review on certiorari to the Indiana Supreme Court from that court's decision in *Irvin* v. *State*, 236 Ind. 384. Certiorari was denied "without prejudice to filing for federal habeas corpus after exhausting state remedies." 353 U. S. 948. The Indiana Assistant Attorney General, on the oral argument here, advised that there was not then, nor is there now, any state procedure available for the petitioner to obtain a determination of his constitutional claim.

counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue.[1]

The *voir dire* examinations of prospective jurors began in Gibson County on November 14, 1955. The averments as to the prejudice by which the trial was allegedly environed find corroboration in the fact that from the first day of the *voir dire* considerable difficulty was experienced in selecting jurors who did not have fixed opinions that the petitioner was guilty. The petitioner's counsel therefore renewed his motion for a change of venue, which motion was denied. He renewed the motion a second time, on December 7, 1955, reciting in his moving papers: "in the voir dire examination of 355 jurors called in this case to qualify as jurors 233 have expressed and formed their opinion as stated in said voir dire, that the defendant is guilty . . . ." Again the motion was denied. Alternatively, on each of eight days over the four weeks required to select a jury, counsel sought a continuance of the trial on the ground that a fair trial at that time was not possible in the prevailing atmosphere of hostility toward the petitioner. All of the motions for a continu-

[1] Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9-1305, provides:

"When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases punishable by death, shall grant a change of venue to the most convenient county. The clerk must thereupon immediately make a transcript of the proceedings and orders of court, and, having sealed up the same with the original papers, shall deliver them to the sheriff, who must, without delay, deposit them in the clerk's office of the proper county, and make his return accordingly: Provided, however, That only one [1] change of venue from the judge and only one [1] change from the county shall be granted."

ance were denied. The State Prosecutor, in a radio broadcast during the second week of the *voir dire* examination, stated that "the unusual coverage given to the case by the newspapers and radio" caused "trouble in getting a jury of people who are not [*sic*] unbiased and unprejudiced in the case."

The petitioner's counsel exhausted all 20 of his peremptory challenges, and when 12 jurors were ultimately accepted by the court also unsuccessfully challenged all of them for alleged bias and prejudice against the petitioner, complaining particularly that four of the jurors, in their *voir dire* examinations, stated that they had an opinion that petitioner was guilty of the murder charged.[3]

Also, at the trial, the State's Prosecuting Attorney took the stand as part of his presentation of the State's case, and over petitioner's objection was allowed to testify that the petitioner, five days after his arrest, on April 13, 1955, had orally confessed the murder of Kerr to him. The Prosecuting Attorney was also permitted in summation, again over petitioner's objection, to vouch his own testi-

[3] The trial judge qualified the jurors in question under the authority of Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9-1504, which provides:

"The following shall be good causes for challenge to any person called as a juror in any criminal trial:

"Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

mony by commenting to the jury, "I testified myself what was told me."

The opinions of the Indiana Supreme Court and the District Court held the constitutional claim to be without merit. *Irvin* v. *State*, 236 Ind. 384, 392–394; *Irvin* v. *Dowd*, 153 F. Supp. 531, 535–539. On the other hand, Chief Judge Duffy of the Court of Appeals, concurring in the affirmance of the dismissal by the District Court, reached a contrary conclusion: "Irvin was not accorded due process of law in the trial which resulted in his conviction and death sentence. In my judgment, he did not receive a fair trial because some of the jury had preconceived opinions as to defendant's guilt, and also because of the conduct of the prosecuting attorney." 251 F. 2d 548, 554.

The Gibson County jury returned its verdict on December 20, 1955, and assessed the death penalty. Indiana law allows 30 days from the date of the verdict within which to file a motion for a new trial in the trial court. Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9–1903. The petitioner's counsel, on January 19, 1956, the 30th day, filed such a motion specifying 445 grounds of error constituting the alleged denial of constitutional rights. However, the petitioner had escaped from custody the night before, January 18, 1956, and on January 23, 1956, the trial court overruled the motion, noting that the petitioner had been an escapee when the motion was filed and was still at large. The petitioner was captured in California about three weeks later and, on February 17, 1956, was confined in the Indiana State Prison.

Under Indiana law the denial of the new trial was not appealable, but was reviewable by the Indiana Supreme Court only if assigned as error in the event of an appeal from the judgment of conviction. The State Supreme Court has held:

> "The statute [providing for appeal] does not authorize an appeal from every ruling which a court

may make against a defendant in a criminal action, but only authorizes an appeal 'from any judgment . . . against him,' and provides for review, upon such appeal, of decisions and rulings of the court made in the progress of the case. This court has construed the statute as authorizing an appeal only from a final judgment in a criminal action. The action of a trial court in overruling a motion for a new trial may be reviewed upon an appeal from a judgment of conviction rendered against a defendant, but the overruling of a motion for a new trial must be assigned as error. In such case the appeal is from the judgment of conviction and not from the ruling upon the motion for a new trial. The overruling of a motion for a new trial does not constitute a judgment and an appeal does not lie from the court's action in overruling such motion." *Selke* v. *State*, 211 Ind. 232, 234.

The judgment of conviction imposing the death sentence was entered January 9, 1956. The petitioner was entitled to appeal, as a matter of right, from that judgment, provided, in compliance with a State Supreme Court rule,[6]

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[6] Rule 2-2 of the Supreme Court of Indiana, Burns' Ind. Stat. Ann., 1946 Replacement Vol. 2, pt. 1, p. 8, provides:

"Time for appeal or review.—In all appeals and reviews the assignment of errors and transcript of the record must be filed in the office of the clerk of the Supreme Court within 90 days from the date of the judgment or the ruling on the motion for a new trial, unless the statute under which the appeal or review is taken fixes a shorter time, in which latter event the statute shall control. If within the time for filing the assignment of errors and transcript, as above provided, it is made to appear to the court to which an appeal or review is sought, notice having been given to the adverse parties, that notwithstanding due diligence on the part of the parties seeking an appeal or review, it has been and will be impossible to procure a bill of exceptions or transcript to permit the filing of the transcript within the time allowed, the court to which the appeal or review is

the appeal was perfected by filing with the Clerk of the Supreme Court a transcript of the trial record and an assignment of errors within 90 days of the judgment. The Supreme Court may, in its discretion, extend the time on proper motion made within the 90-day period. The questions before the Supreme Court are those raised by the appellant in his assignment of errors.

On March 22, 1956, the petitioner applied for an extension of time within which to file the trial transcript and his assignment of errors. This was after he was returned to the custody of the State and well within 90 days from January 9, 1956, the date of the judgment of conviction. We were advised on oral argument that the State objected to this motion "because he [petitioner] had escaped," and a hearing was held on the objection by the State Supreme Court. Petitioner's motion was granted and the time was extended to June 1, 1956. The assignment of errors, timely filed with the trial transcript of some 5,000 pages, assigned only one ground of error—that "the [trial] Court erred in overruling appellant's motion for new trial." The petitioner's brief of over 700 pages opened by advising the State Supreme Court that "Under this single assignment of error, the appellant has combined all errors alleged to have been committed

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sought may, in its discretion, grant a reasonable extension of time within which to file such transcript and assignment of errors. When the appellant is under legal disability at the time the judgment is rendered, he may file the transcript and assignment of errors within 90 days after the removal of the disability."

The statutory provision for appeal is Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9-2301, which provides:

"Appeal by defendant—Decisions and orders reviewed.—An appeal to the Supreme Court . . . may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein: and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed."

prior to the filing of the motion for a new trial." In short, the form of the assignment was a short-hand way of specifying the 415 grounds stated in the motion for new trial as constituting the claimed denial of constitutional rights. Indeed the only arguments made in the lengthy brief related to the constitutional claim. The State's brief devoted some 70 pages to answering these contentions, and in 7 additional pages argued that in any event the Circuit Court had not erred in denying the motion for a new trial because the petitioner was an escapee at the times it was filed and decided.

The case before the Indiana Supreme Court was thus an appeal perfected in full compliance with Indiana procedure; therefore, the court was required under Indiana law to pass on the merits of the petitioner's assignment of error. That the assignment of error was sufficient to present the constitutional claim is evident from the court's acceptance of it as the basis for considering the 415 grounds of alleged error constituting that claim. However, under the single assignment of error, the judgment of conviction could be affirmed by the State Supreme Court if, for any reason finding support in the record, the motion for a new trial was properly overruled. The State argued that the overruling should be upheld on either of two grounds: one, because the petitioner was an escapee at the time the motion was made and decided, and, two, because the trial itself was fair and without error. Petitioner's appeal clearly raised both of these issues and the Indiana Supreme Court discussed both in its opinion.

We think that the District Court and Court of Appeals erred in concluding that the State Supreme Court decision rested on the ground that the petitioner was an escapee when his motion for a new trial was made and decided. On the contrary, the opinion to us is more reasonably to be read as resting the judgment on the holding that the petitioner's constitutional claim is without merit. As we

have shown, under the state procedure, the State Supreme Court could have rested its decision solely on the federal constitutional claim.[7] This, we think, is what the Indiana high court did. The opinion discusses both issues. The discussion of the escape issue concludes with the statement, "No error could have been committed in overruling the motion for a new trial under the circumstances." 236 Ind., at 392. But the opinion proceeds: "Our decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in the case." *Id.*, at 392–393. The conclusion reached after discussion of the merits is: "It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment . . . ." *Id.*, at 394. The court's statement that its conclusion on the escape point made it "unnecessary" to consider the constitutional claim was not a holding that the judgment was rested on that ground. Rather the court proceeded to determine the merits "because of the finality of the sentence" and "to satisfy ourselves that there is no miscarriage of justice." In this way, in our view, the State Supreme Court discharged the obligation which rests upon "the State courts, equally with the courts of the Union, ... to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ." *Robb* v. *Connolly*, 111 U. S. 624, 637. We thus believe that the opinion is to be read as rested upon the State Supreme Court's considered conclusion that the conviction resulting in the death sentence was not obtained in disregard of the protections secured to the petitioner by the Constitution of the United States.

[7] This conclusion was also expressed on the oral argument in this Court by the State's Assistant Attorney General.

In this posture, 28 U. S. C. § 2254 does not bar the petitioner's resort to federal habeas corpus. The doctrine of exhaustion of state remedies in federal habeas corpus was judicially fashioned after the Congress, by the Act of February 5, 1867, greatly expanded the habeas corpus jurisdiction of the federal courts to embrace "all cases where any person may be restrained of his . . . liberty in violation of the constitution or of any treaty or law of the United States . . . ." 14 Stat. 385. Although the statute has been re-enacted with minor changes at various times the sweep of the jurisdiction granted by this broad phrasing has remained unchanged.[8]

Since there inhered in this expanded grant of power, beside the added burden on the federal courts, the potentiality of conflict between federal and state courts, this Court, starting with the decision in *Ex parte Royall*, 117 U. S. 241, developed the doctrine of exhaustion of state remedies, a "rule . . . that the . . . Courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the Constitution, . . . yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of a State, . . ." *Tinsley* v. *Anderson*, 171 U. S. 101, 104–105. The principles are now reasonably clear. "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted." *Ex parte Hawk*, 321 U. S.

[8] The substance of the original Act of 1867 is now found in 28 U. S. C. § 2241, see note 1, *ante*.

114, 116–117. The principles of the doctrine have been embodied in 28 U. S. C. § 2254 which was enacted by Congress to codify the existing habeas corpus practice. See *Darr* v. *Burford*, 339 U. S. 200, 210–214; *Young* v. *Ragen*, 337 U. S. 235, 238, note 4; *Brown* v. *Allen*, 344 U. S. 443, 447–450. As is stated in the Reviser's Note: "This new section is declaratory of existing law as affirmed by the Supreme Court."[9]

The petitioner in this case plainly invoked "all state remedies available" and obtained "a final determination" of his constitutional claim from the Indiana Supreme Court. Certainly *Brown* v. *Allen*, 344 U. S. 443, relied upon by the Court of Appeals, does not bear on his situation. In that case the two petitioners in *Daniels* v. *Allen* had 60 days in which to make and serve a statement of the case on appeal from a conviction in the state trial court. Counsel failed to serve this statement until 61 days had expired, and the trial judge struck the appeal as out of time. The pertinent North Carolina rule provided that the time limitation was "mandatory," and precluded an appeal to the State Supreme Court. The State Supreme Court dismissed petitioners' attempted appeal on the ground that no appeal had been filed. This Court held that under the doctrine of exhaustion of state remedies habeas corpus ought not be granted since petitioners had sought too late to invoke North Carolina's "adequate and easily-complied-with method of appeal." 344 U. S., at 485. In contrast, the petitioner's appeal from his judgment of conviction to the Indiana Supreme Court raising the constitutional claim was timely and was accepted by that court as fully complying with all pertinent procedural

[9] For the legislative history, see H. R. Rep. No. 2646, 79th Cong., 2d Sess., p. A172; H. R. 3214, 80th Cong., 1st Sess.; H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A180; S. Rep. No. 1559, 80th Cong., 2d Sess., pp. 9–10.

requirements. Furthermore, the State Supreme Court did reach and decide petitioner's federal constitutional claim.

We therefore hold that the case is governed by the principle that the doctrine of exhaustion of state remedies embodied in 28 U. S. C. § 2254 does not bar resort to federal habeas corpus if the petitioner has obtained a decision on his constitutional claims from the highest court of the State, even though, as here, that court could have based its decision on another ground. *Wade* v. *Mayo*, 334 U. S. 672. In this view, we do not reach the question whether federal habeas corpus would have been available to the petitioner had the Indiana Supreme Court rested its decision on the escape ground.

The judgment of the Court of Appeals is reversed and the case is remanded to that court. The Court of Appeals may decide the merits of petitioner's constitutional claim, or remand to the District Court for further consideration of that claim, as the Court of Appeals may determine.

It is so ordered.

MR. JUSTICE STEWART concurs in the judgment and the opinion of the Court, with the understanding that the Court does not here depart from the principles announced in *Brown* v. *Allen*, 344 U. S. 443.

SUPREME COURT OF THE UNITED STATES

No 63.—October Term, 1958.

Leslie Irvin, Petitioner, v. Alfred F. Dowd, Warden of the Indiana State Prison.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 4, 1959.]

Mr. Justice Frankfurter, dissenting.

The problem represented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism. It concerns the relation of the United States and the Courts of the United States to the States and the Courts of the States. The federal judiciary has no power to sit in judgment upon a determination of a state court unless it is found that it must rest on disposition of a claim under federal law.* This is so whether a state adjudication comes directly under review in this Court or reaches us by way of the limited

*The formulation by Mr. Chief Justice Fuller, for the Court, of this jurisdictional *sine qua non* in *California Powder Works* v. *Davis*, 151 U. S. 389, 393, represents the undeviating practice of the Court until today:

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

scope of habeas corpus jurisdiction originating in a District Court. (Judicial power is not so restrictively distributed in other federalisms comparable to ours. Neither the Canadian Supreme Court nor the Australian High Court is restricted to reviewing Dominion and Commonwealth issues respectively. The former reviews decisions of provincial courts turning exclusively on provincial law and the latter may review state decisions resting exclusively on state law.) To such an extent is it beyond our power to review state adjudications turning on state law that even in the high tide of nationalism following the Civil War, this Court felt compelled to restrict itself to review of federal questions, in cases coming from state courts, by limiting broadly phrased legislation that seemingly gave this Court power to review all questions, state and federal, in cases jurisdictionally before it. It refused to impute to Congress such a "radical and hazardous change of a policy vital in its essential nature to the independence of the State courts . . . ." *Murdock* v. *Memphis*, 20 Wall. 590, 630. This decision has not unjustifiably been called one of "the twin pillars" (the other is *Martin* v. *Hunter's Lessee*, 1 Wheat. 304) on which have been built "the main lines of demarcation between the authority of the state legal systems and that of the federal system." Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 503–504.

Something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this Court has general discretion to see justice done. Nor is it one of those "technical" matters that laymen, with more confidence than understanding of our constitutional system, so often disdain.

In view of so vital a limitation on our jurisdiction, this Court has, until relatively recently, been very strict on insisting on an affirmative showing on the record, when review is here sought, that it clearly appear that the judgment complained of rested on the construction of federal law and was not supportable on a rule of local law beyond our power to question. Particularly in cases where life or liberty are at stake, the Court has relaxed this insistence to the extent of giving state courts an opportunity to clarify a decision that could fairly be said to be obscure or ambiguous in establishing that it rested or could rest on an interpretation of state law. No doubt this procedure makes for delay in ultimate decision. But it ensures that there is no denial of the right to resort to this Court for the vindication of a federal right when a state court's adjudication leaves fair ground for doubt whether a federal right controlled the issue. Experience shows that this procedure for clarification at times establishes that it was, in fact, federal law on which the state decision rested, while in other instances the state court removed all doubt that state law supported its decision, and there was an end of the matter. Compare *Whitney* v. *California*, 274 U. S. 357, and *Herb* v. *Pitcairn*, 324 U. S. 117, 325 U. S. 77, with *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, and *Van Cott* v. *State Tax Comm'n*, 98 Utah 264; *Minnesota* v. *National Tea Co.*, 309 U. S. 551, and *National Tea Co.* v. *State*, 208 Minn. 607; *Williams* v. *Georgia*, 349 U. S. 375, and *Williams* v. *State*, 211 Ga. 763.

Even the most benign or latitudinarian attitude in reading state court opinions precludes today's decision. It is not questioned that the Indiana Supreme Court discussed two issues, one indisputably a rule of local law and the other a claim under the Fourteenth Amendment. That court discussed the claim under the Fourteenth Amendment rather summarily, after it had dealt

extensively with the problem of local law. If the Indiana court's opinion had stopped with its lengthy discussion of the local law and had not gone on to consider the federal issue, prefacing its consideration with the introductory sentence that "[o]ur decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in this case. . . ." (*Irvin* v. *State*, 236 Ind. 384, 392–393), it is inconceivable that, on the proceeding before us, we would entertain jurisdiction. What this Court is therefore saying, in effect, is that it interprets the discussion of the Fourteenth Amendment problem which follows the elaborate and potentially conclusive discussion of the state issue not as resting the case on two grounds, state and federal, but as a total abandonment of the state ground, a legal erasing of the seven-page discussion of state law. Concededly, if a state court rests a decision on both an adequate state ground and a federal ground, this Court is without jurisdiction to review the superfluous federal ground. For while state courts are subject to the Supremacy Clause of the United States Constitution (Art. VI, § 2), they are so subject only if that Clause becomes operative, and they need not pass on a federal issue if a relevant rule of state law can dispose of the litigation.

It may be that it is the unwritten practice of the Indiana Supreme Court to have an "unnecessary" consideration of a federal issue wipe out or displace a prior full discussion of a controlling state ground. Maybe so. But it is surely not a self-evident proposition that discussion of a federal claim constitutes abandonment of a prior disposition of a case on a relevant and conclusive state ground. The frequency with which state court opinions indulge in the superfluity of dealing with a federal issue

after resting a case on a state ground, affords abundant proof that we cannot take judicial notice of an inference that a federal question discussion following a state-ground disposition spells abandonment of the later. Perhaps if counsel had documented such an Indiana practice, had supplied us with a basis for drawing that conclusion regarding the appropriate way of reading Indiana opinions, this Court itself would be entitled to find that such is the way in which Indiana decisions must be read. But we cannot extemporize the existence of such an Indiana practice as a basis for our jurisdiction. Restricted, as we are restricted, to the text of what the Supreme Court of Indiana wrote in 236 Ind. 384, in ascertaining what it is that the Indiana Supreme Court meant to do when it first enlarged upon a controlling state ground and then, *ex gratia*, dealt with an "unnecessary" federal ground, we are not free to pluck from the air an undocumented state practice on the strength of which we are to ignore the bulk of the state court's opinion and treat it as though it had not been written or its significance had been discredited by the Indiana Supreme Court.

In the most compassionate mood, all we are entitled to do in a case like this, where life is at stake, is to afford an opportunity for the Indiana Supreme Court to tell us whether, in fact, it abandoned its state ground and rested its decision solely on the "unnecessary" federal ground. Thus only could this Court acquire jurisdiction over the federal question. Such a remission to the Indiana Supreme Court, by an appropriate procedure, for a clarification of its intention in writing this double-barreled opinion would be in full accord with the series of cases in which the state court was given opportunity to clarify its purpose. To assume, as the Court does, that the Indiana Supreme Court threw into the discard an elaborately considered local law rule is, I most respectfully submit, to assume a jurisdiction that we do not have. This assumption of

jurisdiction cannot help but call to mind the admonition of Benjamin R. Curtis, one of the notable members in the Court's history, that "questions of jurisdiction were questions of power as between the United States and the several States." 2 Cliff. 614 (1st Cir.).

With due regard to the limits of our jurisdiction there is only one other mode of reading the opinion of the Indiana Supreme Court, one other mode, that is, by which the meaning of its opinion is to be decided by that court and not this. That is the mode which my brother HARLAN has explicated, and it is entirely consistent with the governing considerations which I have tried to set forth for me also to join, as I do join, his dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1958.

Leslie Irvin, Petitioner, v. Alfred F. Dowd, Warden of the Indiana State Prison.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 4, 1959.]

Mr. Justice Harlan, whom Mr. Justice Frankfurter, Mr. Justice Clark, and Mr. Justice Whittaker join, dissenting.

Although I agree that federal consideration of petitioner's constitutional claims is not foreclosed by the decision of the Supreme Court of Indiana, I think that the Court's disposition of the matter, which contemplates the overturning of petitioner's conviction without the necessity of further proceedings in the state courts if his constitutional contentions are ultimately federally sustained, rests upon an impermissible interpretation of the opinion of the State Supreme Court (236 Ind. 384), and that a different procedural course is required if state and federal concerns in this situation are to be kept in proper balance.

It is clear that the federal courts would be without jurisdiction to consider petitioner's constitutional claims on habeas corpus if the Supreme Court of Indiana rejected those claims because, irrespective of their possible merit, they were not presented to it in compliance with the State's "adequate and easily complied with method of appeal." *Brown* v. *Allen*, 344 U. S. 443, 485. The first question that concerns us, therefore, is whether the state court's judgment affirming the conviction rests independently on such a state ground.

At the outset we must keep in mind several aspects of Indiana criminal procedure, and the manner in which petitioner's attorneys presented his appeal to the Indiana Supreme Court, all as noted in this Court's opinion. The procedural aspects are (1) that no appeal lies from an order denying a new trial as such, that kind of an order being reviewable only in connection with an appeal from the final judgment in the case; (2) an escapee, such as this petitioner was, has no standing to make a motion for a new trial, at least if he is at large throughout the period available for the making of such a motion, 236 Ind., at 386–392; and (3) an appellant must perfect his appeal by filing assignments of error and a transcript of the record. In the taking of petitioner's appeal from the judgment of conviction the *only* assignment of error filed related to the trial court's denial of the motion for a new trial. While that assignment was supported by a detailed specification of petitioner's constitutional claims, none of such claims was independently filed as an assignment of error.

Had the State Supreme Court declined without more to reach petitioner's constitutional contentions because (1) his motion for a new trial had been forfeited by reason of escape, and (2) such claims had not independently been assigned as error, the federal courts would not, as has been said, be entitled to consider them. The difficulty here is that the state court did not stop at this juncture, but, after pointing out that petitioner had assigned as error only the denial of his motion for a new trial and holding that such denial was not error because of petitioner's escape, went on to consider and find without merit petitioner's constitutional claims.

This Court infers from the fact that the Indiana court considered petitioner's constitutional contentions that its affirmance of his conviction rested entirely on the denial of those claims. It reads the state court's opinion as say-

ing that although that court could under state law properly rest its affirmance of the conviction on petitioner's failure to assign as error anything but the denial of his motion for a new trial, which, as we have seen, was held to have been properly denied under the State's "escapee" rule, it would not do so but would treat petitioner's constitutional claims as if they had themselves been presented as assignments of error, rather than only as grounds supporting the error assigned to the trial court's order denying a new trial. I think this reading of the state court's opinion defies its plain language.

The state court devotes no less than seven pages of its nine-page opinion to an exhaustive discussion of the rule of state law which requires denial of a new trial motion made by an escapee still at large. At the close of this discussion it says:

> "The action upon which the appellant predicates error in this appeal is based solely upon the overruling of a motion for a new trial. There is no other error claimed. Since appellant had no standing in court at the time he filed a motion for a new trial the situation is the same as if no motion for a new trial had been filed, or he had voluntarily permitted the time to expire for such filing. His letter reveals he was aware of this right, and had talked with his attorneys about a new trial and an appeal.
>
> "No error could have been committed in overruling the motion for a new trial under the circumstances.
>
> "Our decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in this case. . . ." 236 Ind., at 392–393.

The opinion then reviews the petitioner's constitutional contentions, and concludes with the statement:

> "It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment, or due course of law under the Bill of Rights, or that there was any miscarriage of justice when he was convicted and given the death penalty." *Id.*, 394.

This Court's reading of the Indiana opinion makes the exhaustive discussion in that opinion of the status of an escapee under Indiana law entirely unnecessary and meaningless. While I agree with the Court that the Indiana Supreme Court reached a "considered conclusion that the conviction resulting in the death sentence was not obtained in disregard of the protections secured to the petitioner by the Constitution of the United States," it is fully apparent that the state court ultimately rested its judgment of affirmance squarely on the ground that the petitioner's *sole* assignment of error, the denial of his motion for a new trial, was without merit because he was an escapee when that motion was made, and when it was denied. The fact that the Indiana court also reached a conclusion that petitioner's claims of constitutional deprivation were not made out does not entitle us to ignore the fact that it was on a point of state procedure that it ultimately rested.

Nevertheless, I do not think that in the circumstances of this case the State's contention that the federal courts lack jurisdiction to deal with petitioner's constitutional points can be accepted. The State has conceded that its Supreme Court was empowered in its discretion to disregard the procedural defects in petitioner's appeal. That being so, the state court's constitutional discussion takes on, for me, a vital significance in connection with its procedural holding under state law, namely, that affirmance

of petitioner's conviction was rested on this state ground only *after* the Indiana court, displaying a meticulous concern that state procedural requirements should not be allowed to work a "miscarriage of justice," particularly in view of "the finality of the sentence," had satisfied itself that petitioner's constitutional contentions were untenable. Such a reading of the state court's opinion is required to give meaning to its constitutional discussion, for if petitioner's procedural failures inexorably prevented the state appellate court from reaching his constitutional claims their discussion in its opinion would appear to have been wholly pointless. At the same time this view of the opinion deprives Indiana's procedural holding of vitality as a bar to consideration of petitioner's constitutional claims by the federal courts on habeas corpus, for the decision as to those claims was inextricably a part of that holding. I therefore think that the two courts below should have dealt with the merits of petitioner's constitutional points.

However, even were the federal courts ultimately to hold that petitioner was denied due process, it would not be within their province thereupon to order his release. At that point it would unmistakably be the prerogative of the Indiana Supreme Court to decide whether on different postulates of federal constitutional law it would nevertheless hold that under Indiana law petitioner would still be barred from being heard because of his failure to comply with the State's procedural rules. For just as it is the federal courts' responsibility and duty finally to decide the federal questions presented in this case, it belongs to the Indiana Supreme Court finally to decide the state questions presented in the light of federal decision as to the commands of the Fourteenth Amendment. Hence if petitioner ultimately prevails on his constitutional claims, further proceedings in the state courts will be unavoidable.

In this state of affairs I think our proper course should be to proceed ourselves to a decision of the constitutional issues, rather than remand the case to the Court of Appeals. If the judgment of the Indiana Supreme Court is potentially going to be called into question because of a federal court's conclusion that it is based in part on erroneous constitutional postulates, I believe that Indiana is entitled to have that conclusion authoritatively pronounced by this Court. Moreover, the District Court, and one judge of the Court of Appeals, have already given clear (and conflicting) statements of their views as to the merits of such issues. The questions have been exhaustively briefed and fully argued before us. And this course would avoid further protracted delay.

Were we to conclude that the Indiana Supreme Court was correct in its premise that petitioner's constitutional points are without merit, the judgment of the Court of Appeals dismissing the writ of habeas corpus should of course be affirmed. If, on the other hand, we should decide that petitioner was in fact deprived of due process at trial, I would hold the case and give petitioner a reasonable opportunity to seek, through such avenues as may be open to him, a determination by the Indiana Supreme Court as to whether, in light of such a decision, it would nevertheless hold that petitioner's failure to comply with the State's procedural rules required affirmance of his conviction. Cf. *Patterson* v. *Alabama*, 294 U. S. 600; *Williams* v. *Georgia*, 349 U. S. 375. Should no such avenues be open to petitioner in Indiana, it would then be time enough to decide what final disposition should be made of this case.

For these reasons I concur in the view that federal consideration of petitioner's constitutional claims is not precluded, and in all other respects dissent from the Court's opinion.

No. 63, October Term, 1958

LESLIE IRVIN, PETITIONER

vs.

ALFRED F. DOWD, WARDEN OF INDIANA STATE PRISON.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Seventh Circuit, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for proceedings in conformity with the opinion of this Court.

May 4, 1959

Clerk's $150

The above amount to be paid directly to the Clerk of the Supreme Court of the United States, Washington 25, D.C.

Mr. Justice Stewart concurs in the judgment and the opinion of this Court, with the understanding that the Court does not here depart from the principles announced in Brown v. Allen, 344 U.S. 443.

Dissenting opinion by Mr. Justice Frankfurter.

Dissenting opinion by Mr. Justice Harlan with whom Mr. Justice Frankfurter, Mr. Justice Clark, and Mr. Justice Whittaker join.

A true copy

Test: JAMES R. BROWNING, Clerk of the Supreme Court of the United States.

Certified this ninth day of June, 1959.

By: (s) R. J. BLANCHARD,
Deputy.

(Endorsed: Filed June 11, 1959. Kenneth J. Carrick, Clerk.)

39 IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12080

LESLIE IRVIN, PETITIONER-APPELLANT

vs.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

Order retaining jurisdiction—October 21, 1959

Before Hon. F. RYAN DUFFY, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge;* Hon. LATHAM CASTLE, *Circuit Judge.*

It appearing (1) that the judgment of this court entered in the above-entitled cause, on January 29, 1958, was, on May 4, 1959, reversed by judgment of the Supreme Court of the United States and this cause was thereby remanded to this court for proceedings in conformity with the opinion of the Supreme Court of the United States filed on May 4, 1959; (2) that the judgment of this court was heretofore entered following the consideration of briefs and oral arguments of counsel for the respective parties; and (3) that, since the filing in this court on June 11, 1959 of a certified copy of the judgment of the Supreme Court of the United States reversing and remanding said cause as aforesaid, this court has carefully examined and considered the entire record and files of the proceedings in the United States District Court for the Northern District of Indiana, South Bend Division, which include a complete transcript of all proceedings affecting petitioner in the circuit courts of Vanderburgh County and Gibson County, Indiana, respectively, as well as the briefs heretofore filed herein by counsel for both sides, and this court having considered the aforesaid opinion of the United States Supreme Court, as well as the accompanying opinions written

by Mr. Justice Stewart, Mr. Justice Frankfurter and Mr. Justice Harlan, it is hereby determined by this court that the merits of the federal constitutional claim of petitioner-appellant be decided by this court and that this case be not remanded to the District Court for further consideration of that claim.

And the court, being fully advised in the premises, *It is hereby ordered* that this cause be and it is hereby taken under advisement by this court without further oral argument.

40 IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12080

SEPTEMBER TERM, 1959 SEPTEMBER SESSION, 1959

LESLIE IRVIN, PETITIONER-APPELLANT

v.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE

ORIGINALLY DECIDED ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION; NOW ON REMANDMENT FROM THE UNITED STATES SUPREME COURT

Opinion—October 23, 1959

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. We heretofore, *Irvin* v. *Dowd*, 251 F. 2d 548, affirmed an order of the district court dismissing a petition for writ of habeas corpus filed by petitioner, who is also referred to herein as "defendant".[1] Subsequently our judgment was reversed and this case was remanded to this court, 359 U.S. 394. The federal Supreme Court held, at 405, that the state Supreme Court decided

[1] For the opinion of the district court, see 153 F. Supp. 531.

petitioner's federal constitutional claim. In remanding, at 407, the court left it to us to decide the merits of that claim or to remand to the district court for further 41 consideration thereof. We have determined to decide the merits of that claim.

As stated in his brief, defendant's constitutional claim of denial of due process of law is based principally upon his allegations of bias and prejudice in the community where his trial occurred and a preconceived opinion of the trial jurors that defendant was guilty.

As the Supreme Court said, 359 U.S., at 396:

> "* * * Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner, counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue."

1. It cannot be denied that it was the duty of the state of Indiana to apprehend and punish the person who perpetrated the aforesaid murders. Upon a state there rests no more sacred duty than the protection of the lives of its citizens
42 from criminal attack. At the same time the state owes a duty to any person charged with such crimes to afford him a fair trial as required by the federal constitution. What is a fair trial depends upon the circumstances existing at and prior to the trial. An accused's right to a fair trial is coexistent with the right of law-abiding citizens to lawful protection by their government. It is not surprising that, the more extensive the news coverage of a crime and the more wanton and unjustified the crime itself, the greater and more extensive is the indignation of citizens. Such indignation, varying in its degree according to the violence of the crime, and geographically extensive with the area of news distribution, undoubtedly causes many people to form impressions or beliefs as to the guilt or innocence of suspected or indicted persons. In these days of widely effective and thorough news distributing instrumentalities, such as the telephone, newspaper, radio and television, as well as rapid travel of persons by automobiles, trains and airplanes, hardly a person anywhere in a state, or in fact in the United States, is long ignorant of the details of crimes committed in any state (or in this country), unless he be completely mentally incompetent or is in solitary confinement in a jail. In fact, it may well be that into the latter place the grapevine reaches. We no longer live in a day when what happened in the next county was learned only by conversation with a traveling man or a brakeman on the way freight train. It is into this modern society with facilities for quick and broad news coverage that a person who commits six murders projects himself. When apprehended, he is entitled to a fair trial and is to be accorded due process of law, according to the existing circumstances.

Our problem in its last analysis is whether the general resentment of a people following the publication by news distributing media of information in regard to a series of murders may be relied upon to prevent the state from prosecuting a person indicted for these crimes, even though his trial be held before

an unbiased judge and a jury is selected in accordance with established principles applicable to such a case If the state is so prevented from trying such a person, it means that the commission within a state of a multiplicity of criminal acts, followed by the usual publicity, actually immunizes the
43 offender from prosecution. We reject such a conclusion as the law of this circuit.

There was undoubtedly a prejudice against the person or persons who committed the series of murders, including that of Whitney Leslie Kerr on December 23, 1954 for which defendant was indicted. It was publicly announced that defendant had confessed that killing and five other murders.

There is no contention by defendant that the alleged bias and prejudice in the community affected the judge and interfered with his presiding as a fair jurist or that perjured evidence was produced against defendant at the trial. It is only in the jury box that counsel for defendant professes to find some effect of community prejudice damaging to defendant. It is true that some jurors, when questioned on their *voir dire*, admitted a preconceived opinion that he was guilty. History shows that this is not an unprecedented situation. Accordingly it has been met by the law. Usually there is a pertinent statute, such as that in effect in Indiana, § 9-1504 Burns Indiana Statutes, Annotated, which reads:

> Challenges for cause.—The following shall be good causes for challenge to any person called as a juror in any criminal trial:
>
> * * * * *
>
> Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction,

> or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case.

44 The record reveals that the trial judge applied this act in this case. With painstaking care, the court, in asking questions of jurors expressing an opinion as to the guilt or innocence of defendant, founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, required each such juror to state on oath whether he felt able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence. Several of those who answered in the affirmative were accepted upon the trial jury. Defendant now seeks to have us determine, as a matter of federal constitutional law, that this action by the trial court deprived defendant of a fair trial.

We have no right to question the intelligence, the truthfulness or the sincerity of these jurors, whose impartiality to render a verdict upon the law and the evidence was, after examination, determined to the trial judge's satisfaction, in the manner provided by the Indiana act.

A careful reading of the entire record convinces us that the jury which tried defendant was properly qualified as a fair and impartial fact-finding body.

In *Reynolds* v. *United States*, 98 U.S. 145, 155, the court said:

> "* * * The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It

is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon
45 the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. * * *."

In *Hopt* v. *Utah*, 120 U.S. 430, 434, a juror who formed a qualified opinion based upon newspaper accounts, testified that he could try the case according to the evidence given in court. The Supreme Court held that the judgment of the trial court that the juror was competent was conclusive.

In *Holt* v. *United States*, 218 U.S. 245, 248, the court said:

"* * * The finding of the trial court upon the strength of the juryman's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest * * *."

While our conclusion suffices to dispose of the point now under consideration, we note the existence in New York of a statute dealing with a juror "who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *": *People* v. *Buchalter*, 45 N.E. 2d 225, 245, 289 N.Y. 181. When the case reached the United States Supreme Court, *Buchalter* v. *New York*, 319 U.S. 427, the court said, at 430:

"The petitioners assert that, in view of unfair and lurid newspaper publicity, it was impossible to obtain an impartial jury in the county of trial, and that the rulings of the court denying a change of venue, and on challenges to prospective jurors, resulted in the impanelling of a jury affected with bias. We have examined the record and are unable, as the court below

was to conclude that a convincing showing of actual bias on the part of the jury which tried the defendants is established. Though the statute governing the selection of the jurors and the court's rulings on challenges are asserted to have worked injustice in the impanelling of a jury, *such assertion raises no due process question* requiring review by this court." (Italics supplied.)

2. During his trial defendant made several motions for continuance based upon what he described as bias and
46 prejudice against him in the community. These motions were denied and he insists that such action violated due process of law. He reasons that "it is difficult to predict what would have happened had this cause been continued until a later date", and "it is difficult to say whether it would have been again necessary for Petitioner-Appellant to have sought an additional continuance, or whether, at that time, the bias and prejudice against Petitioner-Appellant would have subsided."

When these motions were made the trial was under way, the *voir dire* examinations having been commenced on November 14, 1955. This was almost 11 months after the crime had been committed on December 23, 1954, and 8 months after defendant was arrested and made his confession, which had been publicized at the time in Vanderburgh county. It seems to us that there is no more reason to believe that further delay would then have allowed public opinion to subside than that such delay would have incurred greater public feeling aroused by the slowness of the judicial process. In any event the presentation of these motions for continuance required a careful exercise of discretion by the trial judge. His denial of the motions was the exercise of a discretion which will not be disturbed by a reviewing court, in the absence of an abuse thereof. This is recognized by the case which is relied upon by defendant in his brief, *Liese* v. *State*, 233 Ind. 250, 254, 118 N.E. 2d 731. There was no abuse of discretion by the trial judge in this respect.

3. A change of venue was granted to defendant from Vanderburgh county to Gibson county by authority of § 9-1305, Burns Indiana Statutes, Annotated, which reads:

> When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases punishable by death, shall grant a change of venue to the most convenient county. * * * Provided, however, That only one [1] change of venue from the judge and only one [1] change from the county shall be granted.

Defendant repeatedly and unsuccessfully in the Gibson County Circuit Court sought a change of venue from Gibson county.

47 For the first time, defendant, in his brief filed in this court on appeal from the district court, raises a question as to the constitutionality of this change of venue statute, limiting defendant to but one county change of venue. We might well dispose of this point upon the ground that he had not raised it in the court below. We shall, however, consider the validity of this challenge.

It is significant that defendant cites no federal court decision to sustain his *ipse dixit* contention that the act violates the federal constitution. We have found none.

Various states have similar statutes forbidding county changes of venue after a case has been once removed to another county by change of venue. The United States Supreme Court has denied certiorari to review convictions occurring in the county to which a change of venue was granted, but from which a second change of venue was denied. *Patterson* v. *State* (Ala.) (rape), 175 So. 371, cert. denied 302 U.S. 733, and *State* v. *Morgan* (La.) (murder), 84 So. 589, cert. denied 253 U.S. 498. To the same effect, see *People* v. *Doss* (Ill.) (criminal contempt), 46 N.E. 2d 984, cert. denied 320 U.S. 762, reh. den. 320 U.S. 813, app. dism. *Doss* v. *Lindsley*, 325 U.S. 835.

We hold § 9-1305 not unconstitutional, as charged.

4. Defendant contends that he challenged certain jurors for cause and made offers, which were overruled, to prove that they

were biased against him, and he was thus prevented from having a fair trial. However, the record shows that the jurors to whom he refers, Hensley, Montgomery and Higginbotham, were fully examined in open court and that defense counsel participated in interrogating these persons.

If it be assumed *arguendo* that, in a situation such as this, where a prospective juror is subjected to interrogation as to his qualifications by counsel for both sides in a criminal case, an offer to prove that he is disqualified can properly be made by defense counsel, the fact remains that the offers appearing in this record are insufficient in that they state mere conclusions without disclosing the alleged facts upon which the conclusions are based. *Malone* v. *State* (Ind.), 96 N.E. 1, 2.

48 We find no violation of defendant's federal constitutional rights in respect to the rejection by the trial court of these offers.

5. Defendant also urges that the trial court refused to permit him to introduce evidence in an effort to establish an illegal arrest, unlawful detention and involuntary nature of resultant purported confession, which refusal denied him due process of law. We find that the record actually does not show that the court refused permission to defendant to introduce evidence in this respect. Counsel have seized upon a few words at the end of a lengthy objection made by the defense to a question put on December *16*, 1955 to a police officer, who was a state witness, asking what defendant told the witness about the murder of Kerr on April 12, 1955. The jury was then present. This objection was very lengthy and the latter part embodied a statement of facts, concluding with the words "all of which the defendant now asks leave of court to prove and introduce evidence to prove the same." The court said, "Objection overruled". Actually defendant had on December *14*, 1955, introduced evidence on this point at a preliminary hearing out of the presence of the jury, to support his objection to the introduction of his confession. At that time the court overruled defendant's objection. The trial on December 16, 1955 thereupon proceeded before the jury, during which the state witnesses were cross-examined by defense counsel. Moreover, defendant in the trial before the jury undoubtedly had a right

to introduce evidence bearing upon the question of the voluntary nature of his confession. However he offered none. Obviously there is no substance to defendant's contention that he was refused permission to introduce evidence to establish the alleged involuntary nature of his confession.

6. However, relying upon the record, defendant claims that his conviction, based upon a confession obtained by state officers through the use of force, duress and intimidation and while he was being held contrary to Indiana law, violates due process. There was a lengthy trial in the Gibson County Circuit Court. The record now before us shows that the trial was conducted by a judge possessing seemingly inexhaustible patience and exercising meticulous regard for the rights of defendant.

We have examined this record carefully and we are con-
49 vinced of the correctness of the statement made by the Indiana Supreme Court in *Irvin* v. *State*, 236 Ind. 384, 393, 139 N.E. 2d 898, 902:

> "* * * The record reveals, as well as the argument before this court, that appellant had unusually competent counsel furnished at public expense. He was loyally and expertly defended, at every point in the case. Four hundred and fifteen specifications of alleged error are presented in the motion for new trial.
>
> "The contention that the evidence was insufficient to support the verdict is not one of the items. A review of the evidence shows it to be both convincing and credible. Appellant was identified as the last person seen with the victim while alive. That occurred just a few minutes prior to the discovery of the killing. When the state rested appellant offered no evidence in defense. He made a confession. There is nothing to substantiate any claim it was forced or made under fear. Instead it seems appellant made it freely; motivated by a desire to avoid being tried in the state of Kentucky where he was wanted for other charges of multiple murder. It was the appellant who asked for an interview with the prosecuting attorney, Mr. Wever, who had not previously talked to him. Appellant asked if it would be enough if he confessed to the killing. Prosecutor Wever told

him, no, that he would have to have other facts to corroborate his admissions.

"Thereafter, in the company of the sheriff he pointed out the place where he threw the gun. A gun was discovered in a ditch at that point. During the time he was in jail, prior to the confessions he made, he was well-treated; permitted to sleep as desired, visited by friends and relatives, and a priest; told he could have an attorney, and was permitted to make telephone calls. He was permitted to order the kind of food he wanted, and on such occasions was served a menu better than that of the average prisoner, which included fried chicken, steak, and various kinds of special dishes.

"It is true the law enforcement officers questioned him at intervals, but this never lasted over an hour or two at any one time, and it did not interfere with any of his natural wants, including sleep. We find nothing to support the claim that the confession was coerced.

"Law enforcement officers should be commended, not condemned, for the attempts to identify and detect the persons who commit a crime, and this includes the arresting and questioning of suspects so long as the questioning is not done in an atmosphere of fear, threats, coercion and oppression. The obtaining of confessions from guilty persons is desirable, and is permissible in the public interest and welfare, so long as it is done under clearly proper circumstance, which appears to be the case here. A careful search of the record fails to show any contradiction of the confessions, and other evidence of his guilt.

"It does not appear from the record and argument had, that the appellant was denied due process of law under the Fourteenth Amendment, or due course of law under the Bill of Rights, or that there was any miscarriage of justice when he was convicted and given the death penalty."

7. Attorneys Wever and Sandusky, state prosecutors, handled the prosecution at the trial. Over objection of defense, Wever testified that he was informed that defendant

wanted to see him and hence he had a conversation with the defendant, which he related. He was cross-examined. The court instructed the jury that they were "the sole judges of the facts and credibility of the witnesses", and that they had a right to believe the witnesses they deemed most worthy of credit and disbelieve witnesses whom they believed least worthy of credit; that, in "determining whom you will believe you may consider the nature of the evidence given by them, their interest, bias or prejudice, if any disclosed; * * * and in weighing the testimony and determining the credibility of the witness, it is proper for you to take into consideration all the surrounding circumstances of the witnesses as brought out in the evidence, their interest, if any, in the result of the action, and such other facts appearing in the evidence as will, in your opinion, aid you in determining whom you will believe; * * *."

51 The testimony of Wever was cumulative to that of other state witnesses. For instance, he, as well as several police officers, testified about locating the gun, which defendant said he used in killing Kerr, at a place mentioned by defendant in the conversation with Wever. Wever made a closing argument.

Defendant contends that this conduct was unethical and that it violates due process. In a forum where the ethics of Wever's conduct is directly brought in issue by the state of Indiana, it is apparent that a charge of unethical conduct on the foregoing facts would be serious. However, in this case we cannot adjudicate a question of ethics. Certainly the testimony he gave was relevant to the case on trial, and he was a competent witness. As a factual matter the defense offered no evidence to contradict Wever's statement that the defendant wanted to see Wever. Hence it was not a case of the prosecutor seeking evidence by initiating a visit to the defendant. The jury heard a searching cross-examination of Wever by defense counsel and were then instructed by the court as to the right of the jury to consider the interest of a witness in the result of the case, in determining whom the jurors would believe. Therefore, in view of all these circumstances, it is entirely a matter of surmise whether Wever's

conduct had a harmful effect upon defendant in the minds of the jury. It is more reasonable to conclude that the jurors would react against the state in view of such conduct by its legal representative. However that may be, the most that can be said is that this conduct was error which did not have such a substantial effect upon the outcome as to strip the trial of due process. This conclusion finds support in *Burwell* v. *Teets*, 245 F. 2d 154, 168, 9 Cir., cert. denied 355 U.S. 896; *People* v. *Burwell* (Cal.), 279 P. 2d 744, 756, cert. denied 349 U.S. 936.

In *Darcy* v. *Handy*, 351 U.S. 454, 462, the court said:

> "Petitioner has been given ample opportunity to prove that he has been denied due process of law. While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and
> 52 that it be sustained not as a matter of speculation but as a demonstrable reality.' *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281. See also, *Buchalter* v. *New York*, 319 U.S. 427, 431; *Strobie* v. *California*, 343 U.S. 181, 198. Justice Holmes, speaking for a unanimous Court in *Holt* v. *United States*, 218 U.S. 245, 251, cautioned that 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.'"

8. As to the contention of defendant that the trial court denied him permission to have a court stenographer report the prosecutor's closing argument to the jury, it is settled practice in the courts of Indiana to not report verbatim closing arguments to juries, unless the trial court so directs. Evidently there was no discrimination against defendant in this respect. Even if there were, it appears that his counsel succeeded in having the trial judge incorporate into the record the precise language used by the prosecutor in his closing argument upon which defendant bases his contention that the prosecutor's con-

duct was unethical;[2] hence the error, if any, in refusing permission to report the entire argument was harmless.

In any event, even if error occurred in this respect, the due process clause of the Fourteenth Amendment does not enable us to review such error. *Buchalter v. New York*, 319 U.S. 427, 431.

For all of the foregoing reasons, we decide that defendant has not sustained his federal constitutional claim that he was convicted in violation of the Fourteenth Amendment. Accordingly, the judgment of the district court is affirmed and the stay of execution heretofore entered herein is vacated.

AFFIRMED AND STAY OF EXECUTION VACATED.

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53 DUFFY, *Circuit Judge*, dissenting in part. I agree with that part of the majority opinion that Sec. 9-1305 Burns Indiana Statutes, Annotated—the change of venue statute—is not unconstitutional.

As to the offer of proof by defendant as to jurors Hensley, Johnson, Montgomery and Higginbotham, I agree with the statement in the majority opinion: "We find no violation of defendant's federal constitutional rights in respect to the rejection by the trial court of these offers."

However, I must respectfully dissent from that part of the majority opinion which holds that the defendant herein had a fair trial. It is well established that: "A fair trial in a fair tribunal is a basic requirement of due process. * * *" *In re Murchison, et al.*, 349 U.S. 133, 136. In my judgment defendant was not afforded due process of law in the trial which resulted in his conviction and upon which verdict the death sentence was imposed.

There is no dispute as to the fact that more than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some of them testified on the *voir dire* that it would take evidence to change that opinion. Defendant had exhausted his twenty peremptor-

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[2] See 359 U.S. 394, at 399.

challenges. His several motions for continuances had been denied.

One of the most important rights of our citizens is the right to a public trial by a fair and impartial jury. The courts should be ever alert to preserve that right untarnished. *Baker* v. *Hudspeth*, 10 Cir., 129 F. 2d 779, 781.

I am well aware that a brutal crime is almost certain to receive extensive news coverage by newspapers, radio and television. I realize that in the instant case a prolonged effort was made to obtain an impartial jury, but I am, nevertheless, forced to the conclusion that the jury, as finally constituted, was not impartial. Possibly it was as impartial a jury as could have been found in Gibson County on that date, but that was not sufficient. That did not insure due process.

When it became apparent that an impartial jury could not be obtained, the motion for a further continuance should
54 have been granted. The majority opinion argues that a further delay might not have been helpful, but, on the other hand, that public opinion might have been aroused by the slowness of the judicial process. The passage of time is a great healer. We have no right to speculate that any subsiding of public prejudice would be offset because our fundamental law insists that a defendant in a criminal case shall have a fair trial.

Another reason for the failure of due process in the instant case is that one of the two state prosecuting attorneys who tried the case also acted as a witness on the trial. The majority opinion, while conceding this was error, seems to brush it aside saying: "However, in this case we cannot adjudicate a question of ethics. • • •" Prosecutor Wever, participated in examining prospective jurors, interposed objections to testimony, and otherwise actively participated in the trial. He then took the stand as a witness and testified concerning a confession made to him. Over objection, he made the closing argument to the jury, commenting on the evidence including his own testimony. Such conduct was in violation of Canon 19 of the Canon of Professional Ethics. Such conduct was offensive to the rights of the defendant to a fair and impartial trial.

55 IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12080

LESLIE IRVIN, PETITIONER-APPELLANT,

vs.

ALFRED F. DOWD, WARDEN, RESPONDENT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION.

Judgment—October 23, 1959

Before Hon. F. RYAN DUFFY, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge;* Hon. LATHAM CASTLE, *Circuit Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and upon remandment to this Court by the Supreme Court of the United States for proceedings in conformity with the opinion filed by the Supreme Court on May 4, 1959, and in accordance with the order heretofore entered by this Court on October 21, 1959.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, *affirmed*, in accordance with the opinion of this Court filed this day.

It is further ordered that, when this Court's mandate in this cause is hereafter issued herein, the stay of execution heretofore entered in this Court be vacated.

56 IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Title omitted).

Order denying petition for rehearing—November 12, 1959

Before Hon. F. RYAN DUFFY, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge;* Hon. LATHAM CASTLE, *Circuit Judge.*

It is hereby ordered by the Court that the petition for rehearing filed by appellant in the above entitled case, on remandment, be, and the same is hereby, *denied*; and

It is further ordered by the Court that appellant's request for oral argument on said petition for rehearing be, and the same is hereby, denied.

57 Clerk's Certificate to foregoing transcript omitted in printing.

58 SUPREME COURT OF THE UNITED STATES

No. 650 Misc.
OCTOBER TERM, 1959

LESLIE IRVIN, PETITIONER

vs.

A. F. DOWD, WARDEN

On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari—February 23, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 722.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 41

LESLIE IRVIN,

Petitioner,

vs.

A. F. DOWD, Warden, Indiana State Prison, Michigan City, Indiana,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

PETITIONER'S BRIEF

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